SUPREME COURT, U. S.
FILED
MAR 2 1979
MICHAEL RODAK, JR. CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1978
No. 78-765

STATE OF MICHIGAN,
Petitioner,

v.

WILLIE B. CONNER,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH M. MOGILL
Attorney for Respondent
1455 Centre Street
Detroit, Michigan 48226
(313) 962-7210

AMERICAN PRINTING COMPANY, 125 WEALTHY STREET, S.E.,
GRAND RAPIDS, MICHIGAN 49503 — PHONE GL 8-5326

TABLE OF CONTENTS

INDEX TO AUTHORITIES ii
COUNTER-STATEMENT OF THE QUESTION 1
COUNTER-STATEMENT OF THE CASE..... 2
REASONS FOR DENYING THE WRIT 3
CONCLUSION 5

INDEX TO AUTHORITIES

Cases: Page

Durley v *Mayo*, 351 US 277, 76 SCt 806, 100 LEd 1178 (1956) 5

Fay v *Noia*, 372 US 391, 83 SCt, 822, 9 LEd2d 837 (1963) 4

Fox Film Corp v *Muller*, 296 US 207, 56 SCt 183, 80 LEd 158 (1935) 4

Henry v *Mississippi*, 379 US 443, 85 SCt 564,13 LEd2d 408 (1965) 4

Jankovich v *Indiana Toll Road Commission*, 379 US 487, 85 SCt 493, 13 LEd2d 439 (1965) 4

Klinger v *Missouri*, 80 US (13 Wall) 256, 20 LEd 257 (1871) 5

Memphis Natural Gas Co v *Beeler*, 315 US 649, 62 SCt 857, 87 LEd 1090 (1942) 5

Murdock v *City of Memphis*, 89 US (20 Wall) 590, 22 LEd 429 (1895) 4

People v *Flemming*, 221 Mich 609 (1923) 3

People v *Lienartowicz*, 225 Mich 303 (1923) 3

People v *Musk*, 221 Mich 578 (1922) 3

People v *Warner*, 221 Mich 657 (1923) 3

Statutes and Court Rules:

MCLA 780.654 4

CL 1915 §15881 4

CL 1915 §17511 4

CL 1929 §17494 4

CL 1929 §17512 4

CL 1948 §776.3 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

No. 78-765

STATE OF MICHIGAN,
Petitioner,

v.

WILLIE B. CONNER,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CETIORARI

For the reasons stated below, Respondent requests this Court to deny a writ of certiorari in this cause.

COUNTER-STATEMENT OF THE QUESTION

Where the Michigan Court of Appeals' judgment affirming the trial judge's suppression of evidence in a criminal case is based on application of both controlling state case law and legislation and federal law, and where the non-federal grounds are independent of the federal ground and adequate to support the judgment, certiorari should be denied.

COUNTER-STATEMENT OF THE CASE

The evidence involved in this case was obtained during a search pursuant to search warrant of 11643 East Vernor, Detroit. The warrant had been issued to 11643 East Vernor "to search the entire premises of the second floor apartment on the east side." The warrant had been issued, however, on the basis of an affidavit describing surveillance of "11641 East Vernor, second floor east apartment." The affidavit contained four (4) references to 11641 East Vernor, including one describing the place to be searched as "11641 East Vernor, second floor east apartment" and no references to 11643 East Vernor. Cf. Michigan Court of Appeals' opinion, Petitioner's Appendix "A" at 13; see also Affidavit ¶5, Petitioner's Appendix "C" at 19.

Prosecution efforts to supplement the affidavit with evidentiary hearing testimony of unsworn statements to the issuing magistrate were rejected by the trial judge on the basis of Michigan law. In addition, because of the discrepancy in the description of the place to be searched, the trial judge held the warrant to be defective, also as a matter of state law.

On May 28, 1976, following evidentiary hearing, the trial judge granted Respondent's Motion to Suppress.

On December 9, 1977, the Michigan Court of Appeals affirmed both aspects of the trial court decision, relying on state case and statutory law and citation to two federal decisions. Cf. Petitioner's Appendix "A" at 12-15.

On August 31, 1978, the Michigan Supreme Court denied leave to appeal.

In its Petition for a Writ of Certiorari in this Court, the State of Michigan has failed to argue or establish the lack of an independent and adequate state ground for the lower court decision.

REASONS FOR DENYING THE WRIT

1. There is an independent and adequate state ground supporting the lower court decision.

In its opinion in this cause, the Michigan Court of Appeals relied on a line of Michigan cases, *People* v *Lienartowicz*, 225 Mich 303 (1923); *People* v *Flemming*, 221 Mich 609 (1923); *People* v *Musk*, 221 Mich 578 (1922); and *People* v *Warner*, 221 Mich 657 (1923), to affirm the trial judge, holding that: (1) The affidavit "[a]t best . . . described two places" and that "an affidavit concerning activities at 11641 cannot supply probable cause for a warrant to search 11643"; and (2) that an unsworn statement to the magistrate could not be considered in determining the validity of the search warrant. Cf. Petitioner's Appendix "A" at 13-14.

Each of the cases relied on by the Court of Appeals is based on Michigan case and statutory law, independent of any federal rights involved. The opinion in *Musk, supra*, is illustrative:

> *The Constitution and legislative acts of this State* prescribe as a prerequisite to the right to search one's home or possessions that the place to be searched and the thing to be searched for shall be alleged on oath . . .
>
> We are of the opinion that the action of the officer . . . was an unjustifiable trespass and a violation of defendant's constitutional and legislative rights. 221 Mich at 580, 581-582 (emphasis added)

Both *Flemming, supra*, and *Lienartowicz, supra*, expressly rely on *Musk*, 221 Mich at 614; 225 Mich at 304, and *Lienartowicz*, also relies on *Flemming*. 225 Mich at 305. *Warner* is based exclusively on Michigan case law.

Each of these cases was decided long before the two federal decisions cited, and each states a rule of state law independent of federal court construction of federal constitutional rights.

Given the independence of a substantive non-federal ground supporting the lower court decision, whether or not the federal cases referred to in the Court of Appeals' opinion were also relied on in support of the decision, or whether they were relied on properly, is immaterial. As this Court noted in *Fox Film Corp* v *Muller*, 296 US 207, 210, 56 SCt 183, 80 LEd 158, 159 (1935), it is a

> settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.

See also *Jankovich* v *Indiana Toll Road Commission*, 379 US 487, 489, 85 SCt 493, 13 LEd2d 439, 441-442 (1965); *Henry* v *Mississippi*, 379 US 443, 446, 85 SCt 564, 13 LEd2d 408, 412 (1965); *Fay* v *Noia*, 372 US 391, 428, 83 SCt 822, 9 LEd2d 837, 863 (1963); *Murdock* v *City of Memphis*, 89 US (20 Wall) 590, 22 LEd 429 (1895).[1]

---

[1]Although MCLA 780.654 was not cited in the Court of Appeals' opinion, this statute, which requires designation and description of the place to be searched, is reflective of longstanding Michigan judicial and legislative policy, cf. CL 1948 §776.3; CL 1929 §17512; CL 1929 §17494; CL 1915 § 17511; CL 1915 §15881, and provides an additional substantive, non-federal ground for the decision below. The statute provides:

> A search warrant shall be directed to the sheriff or any peace officer, commanding such officer to search the house, building or other location or place, where any property or other thing for which he is required to search is believed to be concealed. Each warrant shall designate and describe the house or building or other location or place to be searched and the property or thing to be seized. The warrant shall also state the grounds or the probable or reasonable cause for its issuance, or in lieu thereof, a copy of the affidavit may be attached thereto.

2. Because the decision below relies to such a large extent on independent state law, Petitioner has the burden of establishing the lack of an independent and adequate state ground as an element of establishing this Court's jurisdiction. Cf. *Durley* v *Mayo*, 351 US 277, 76 SCt 806, 100 LEd 1178 (1956); *Memphis Natural Gas Co* v *Beeler*, 315 US 649, 62 SCt 857, 87 LEd 1090 (1942); *Klinger* v *Missouri*, 80 US (13 Wall) 257, 20 LEd 257 (1871). Having failed to argue or establish that lack, Petitioner has failed to sustain its burden of establishing jurisdiction.

CONCLUSION

For all the reasons stated above, the writ should be denied.

Respectfully submitted,

(s) KENNETH M. MOGILL
Attorney for Respondent
1455 Centre Street
Detroit, Michigan 48226
(313) 962-7210

Dated: 3-8-79